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No. 83-490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DAVIS, ET AL.,
Appellants,

v.

GREGORY SCOTT SCHERER,
Appellee.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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March 19, 1984

QUESTION PRESENTED FOR REVIEW

The American Civil Liberties Union will address the following question:

> Is a public official entitled to qualified immunity from damages in an action under 42 U.S.C. § 1983, when the official violates a statute or regulation that clearly requires certain action, and by the same conduct also violates a constitutional right that was not clearly established at the time?

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nonpartisan, nonprofit membership organization dedicated to the protection of civil liberties through a vigorous defense of the fundamental principles embodied in the Bill of Rights. The ACLU has frequently appeared in this Court and in other courts, as counsel for a party and as an *amicus curiae*, in cases raising due process challenges to federal and state governmental actions that constrict personal liberty.

This case concerns the circumstances under which a person who has been injured by a violation of his consti-

tutional rights by a state government official may recover money damages under 42 U.S.C. § 1983. The courts below held that where the government official fails to obey state regulations that require certain conduct and the official's breach is later held to violate the Constitution, the official is not entitled to qualified "good faith" immunity. That holding is correct and sensible. Reversal of the lower courts—as the United States in an *amicus* role urges—would mark a significant departure from the Court's prior decisions that accord immunity only for discretionary activities and for actions taken in good faith, as determined by an objective standard. In short, reversal would significantly curtail the right of persons seeking redress for constitutional violations with consequences far beyond this particular case. For that reason, the ACLU urges this Court to affirm.[1]

STATEMENT

Summary of Facts

Appellee Gregory Scott Scherer formerly was a career employee of the Florida Highway Patrol. (J.S. 3a) An agency policy required approval of outside employment to avoid conflicts of interest. (J.S. 4a) Early in September 1977 Mr. Scherer received written permission to accept a parttime second job as a reserve deputy for a county sheriff's office. He was told that the permission would be rescinded if the parttime employment should interfere with his duties as a radio operator for the Florida Highway Patrol or create a conflict of interest. (J.S. 5a) Relying on this permission, Mr. Scherer bought a uniform and pistol and began work as a reserve deputy. (J.S. 5a) Several weeks later the Highway Patrol rescinded its authorization of Mr. Scherer's parttime employment, without stating how the job interfered with his duties or created a conflict of interest. (J.S. 6a)

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[1] The parties have consented to our filing this brief. Their letters of consent have been filed with the Clerk.

When his immediate superiors requested that he resign from his employment as a reserve deputy, Mr. Scherer responded that he had invested too much money in uniforms to give up his parttime work. (J.S. 6a-7a) Mr. Scherer also explained that he believed there was no reason for him to resign his position as a reserve deputy because it did not interfere with his work for the Highway Patrol. (J.S. 7a)

Mr. Scherer's immediate superiors then referred the matter to appellant Eldredge Beach, the Director of the Highway Patrol. (J.S. 7a-8a) By a letter dated October 24, 1977, signed by Mr. Beach and approved by appellant Ralph Davis (at that time the Executive Director of the Department of Highway Safety and Motor Vehicles), Mr. Scherer was terminated from his employment with the Highway Patrol effective October 20, 1977. (J.S. 9a)

Mr. Beach and Mr. Davis dismissed Mr. Scherer without giving him notice of the proposed discharge, informing him how his outside employment violated departmental regulations, or providing him an opportunity to respond to Mr. Beach, the official responsible for making the decision. (J.S. 9a) In doing so, Messrs. Beach and Davis violated a departmental regulation, General Order No. 43, that specified the procedures to be followed before dismissing an employee because of violations of departmental rules.[2] (J.S. 79a) That regulation, which had been prom-

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[2] The regulation reads, in pertinent part, as follows:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations . . ., the Director *shall* order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report *will* also contain a written statement made *by* the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he *will* present the employee in writing with the reason or reasons for such actions.

(J.S. 69a) (emphasis added).

ulgated on September 1, 1977, requires the Director of the Florida Highway Patrol to order a complete investigation of the circumstances of an alleged violation, to obtain a written statement of the employee against whom the complaint is made, and, if the Director decides to dismiss the employee after review of the investigation report and the employee's statement, to explain in writing to the employee the reason for the action.

After receiving the termination letter, Mr. Scherer filed an administrative appeal of the dismissal. He also instituted a separate administrative challenge to the dual employment rule. Before a hearing on the dismissal was held, the dual employment regulation was invalidated. (J.S. 11a) The Highway Patrol then agreed to reinstate Mr. Scherer with partial back pay. (J.S. 13a-14a) In January 1979, he resigned from the Highway Patrol to accept another job. (J.S. 22a-23a)

The Proceedings Below

On June 1, 1979, Mr. Scherer brought suit under 42 U.S.C. § 1983 against Mr. Davis, Mr. Beach, and Chester Blakemore, the present Executive Director of the Department of Highway Safety and Motor Vehicles. Mr. Scherer requested a declaratory judgment that the procedures by which appellants terminated him constituted a denial of due process in violation of the Fourteenth Amendment. Mr. Scherer also sought money damages.

On July 15, 1981, the District Court for the Northern District of Florida held that the statute and implementing rules governing pre-termination and post-termination procedures at the time of Mr. Scherer's dismissal were unconstitutional because they failed to safeguard an employee's property and liberty interests in his employment. In particular, the court concluded that Mr. Scherer "did not have an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination deci-

sion whether the pursuance of dual employment constituted cause for dismissal." (J.S. 35a) The Court found that Messrs. Davis and Beach were not entitled to assert a "good faith" immunity defense against liability for damages, because the law concerning pre-termination procedural due process was settled by the time of their dismissal of Mr. Scherer. (J.S. 46a) Accordingly, the court awarded Mr. Scherer $4,200 in compensatory damages.[3] The appellants' violation of the procedures specified in General Order No. 43 was not raised or addressed by the district court in its July 15, 1981 Memorandum Opinion and Order.

Five days after the district court issued its decision, the Fifth Circuit decided *Weisbrod v. Donigan*, 651 F.2d 334 (5th Cir. 1981), holding that pre-termination procedures for state employees required by due process were not clearly established until late 1978. Upon reconsideration of the July 15, 1981 decision in this case in light of *Weisbrod*, the district court vacated its determination that Messrs. Davis and Beach were not entitled to qualified immunity because they violated clearly established constitutional standards. The court nevertheless concluded that the appellants lost their immunity by violating their own departmental regulation governing pre-termination procedures. On that basis, the court found that "their belief in the legality of the challenged conduct was unreasonable." (J.S. 70a) The damages award of $4,200, therefore, was allowed to stand.

The Eleventh Circuit affirmed the judgment of the district court on the basis of the district court's opinion. (J.S. 83a-84a)

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[3] The court based this award on the physical and mental pain and suffering, including the humiliation and embarrassment of losing a job and having trouble with creditors, that the court found Mr. Scherer suffered during his 42 weeks of unemployment between October 1977 and August 1978, when he was reinstated. (J.S. 14a-15a & 47a-48a) The court also awarded exemplary damages but that award was vacated upon reconsideration. (J.S. 72a)

SUMMARY OF ARGUMENT

This case poses the question whether a public official is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), when he violates clearly established statutory or regulatory provisions and, by the same conduct, also violates constitutional rights that were not clearly established at the time.[4] For the following reasons, *Harlow* and the balance of policies underlying the doctrine of qualified immunity dictate that immunity be denied in such circumstances.

First, qualified immunity protects only discretionary conduct. Because qualified immunity is designed to encourage the vigorous exercise of discretion without unduly denying redress to persons whose constitutional rights have been violated, the Court has not extended immunity to conduct not involving the exercise of discretion. Where, as here, a statute or regulation prescribes specific official conduct, the public official has no discretion to act otherwise. Accordingly, the purposes of immunity are not furthered by foreclosing suit against an official based on conduct in violation of applicable statutory or regulatory law.

Second, qualified immunity is available only for officials whose conduct conforms to a standard of "objective legal reasonableness." *Harlow v. Fitzgerald*, 457 U.S. at

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[4] The ACLU fully endorses appellee's position here that the constitutional due process rights at issue were clearly established in October 1977. Nevertheless, for the purpose of this brief, we will assume *arguendo* that the district court's holding on this point, after *Weisbrod*, was correct.

The ACLU will not address the question whether the district court properly held that the Florida statute governing termination procedures is unconstitutional. The ACLU agrees with appellee that this portion of the judgment below was erroneous, and that this Court should accept the appeal and summarily vacate this portion of the judgment. If the Court nevertheless decides to address the qualified immunity question, the ACLU urges the Court to affirm the judgment below insofar as it held that appellants are not entitled to qualified immunity.

819. This limitation recognizes that it is unfair to subject officials to damages actions for conduct that was at the time objectively reasonable. But conduct that contravenes statutory or regulatory law applicable to the official is not objectively reasonable or in good faith. It is not unfair to hold an official liable for actions that turn out to violate the Constitution when those very actions also violate statutes or regulations and therefore should never have been taken.

Third, the denial of immunity to an official who violates statutory or regulatory provisions is consistent with the goal, expressed in *Harlow*, of preventing insubstantial suits from proceeding to trial. A contention that well defined statutory or regulatory law directly applicable to the challenged conduct or decision has been violated raises a strictly legal question that is the same kind of inquiry as is required to determine whether the constitutional provisions allegedly violated were clearly established at the time of the official's actions. In addition, denying immunity when an official's unlawful conduct under statutory or regulatory law is also the ground for the constitutional claim will neither deter the vigorous exercise of official discretion nor discourage states from enacting regulatory measures.

ARGUMENT

GOVERNMENT OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY ONLY WHEN PERFORMING DISCRETIONARY FUNCTIONS AND ONLY INSOFAR AS THEIR CONDUCT DOES NOT VIOLATE CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHTS.

A. The Qualified Immunity Defense Is Available Only For Officials Performing Discretionary Functions.

A threshold requirement for qualified immunity, both at common law and under *Harlow*, is that the challenged action must have been performed in the exercise of discretion. *See Harlow v. Fitzgerald*, 457 U.S. at 816 & 818. This requirement serves to confine the immunity defense to those circumstances where it fulfills its principal purpose: protecting the vigorous exercise of governmental discretion. Thus, the "discretionary function" requirement is an integral part of the careful balance between the protection of constitutional rights and the promotion of effective government that underlies the doctrine of qualified immunity.

In this case, it is undisputed that a departmental regulation specified the procedures that appellants were required to follow before they could lawfully terminate Mr. Scherer's employment. The regulation eliminated all discretion from the choice of pre-termination procedures—the very action that the district court held violated Mr. Scherer's constitutional rights in this suit. Thus, appellants were properly denied immunity from liability for damages under Section 1983.

1. Although the language of Section 1983 is unqualified and does not provide for any immunities, the Court has determined that Congress intended to preserve the common-law principles entitling public officials to limited immunity from liability for damages. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Tenney v. Brand-*

hove, 341 U.S. 367, 376 (1951). Thus, the Court has held that legislators, judges, and prosecutors are generally entitled to the same absolute immunity from damages liability under Section 1983 as they enjoyed at common law. *See Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators). Where the common law did not afford immunity from damages, as in the case of municipalities, the Court has held that no immunity is available under Section 1983. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

A central tenet of the common-law doctrine of official immunity is that public officials are entitled to immunity when exercising discretion, but not when their conduct is prescribed by law.[5] In determining the scope of the qualified immunity available in constitutional damages actions, the Court has adhered to the "discretionary function" limitation that existed at common law. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. at 816 & 818 (immunity shields "government officials performing discretionary functions").

2. When an official's conduct is mandatory or does not involve any substantial choice among alternatives, the interests in redressing private injury and checking official misconduct clearly outweigh the concern for the vigorous exercise of official judgment. The only appropriate judgment the official may make in such a case is to do what the applicable laws require. Accordingly, there is no ex-

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[5] *See Amy v. Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870) (immunity is unavailable for officials who fail to comply with writ of mandamus); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (postmaster does not exercise discretion in applying statutory postage rates); *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1836). In *Tracy*, a customs collector required a bond in excess of the legal amount. The Court held that the official was not entitled to immunity, stating that "[i]t would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Id.* at 95.

ercise of discretion to protect. Because the immunity of public officials from damages should be no broader than is necessary to achieve the purposes of the defense, *see Smith v. Wade*, 103 S. Ct. 1625, 1640 (1983); *Harlow v. Fitzgerald*, 457 U.S. at 811, immunity should not be granted when nondiscretionary conduct is involved.[6]

In the present case, the challenged conduct of appellants Davis and Beach did not involve any exercise of discretion. That appellants may exercise discretion in performing other duties, and may indeed have exercised discretion with respect to some aspects of the decision to terminate Mr. Scherer, is irrelevant.[7] Mr. Scherer is seek-

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[6] Early Supreme Court cases, cited by the Court in *Butz v. Economou*, 438 U.S. 478, 490-91 (1978), recognized this principle in holding federal officers liable for actions that were illegal under state law because they had acted outside their statutory authority. *See Bates v. Clark*, 95 U.S. 204 (1877); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 U.S. (1804). *See also Amy v. Supervisors*, 78 U.S. (11 Wall.) 136 (1870) (no exercise of discretion where writ of mandamus compels certain action); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (postmaster not exercising discretion in applying statutory postage rates). More recently, a state court held that police officers were not exercising discretion, and were therefore not entitled to immunity, when they failed to adhere to mandatory arrest provisions in a statute that identified the precise circumstances when police officers should make arrests to protect against domestic violence. *See Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137, 142-43 (1983). The court explained that discretion "exists only insofar as an officer has been delegated responsibility for value judgments and policy choices among competing goals and priorities. Patently the purpose of [this statute] was to negate any discretion of that kind . . . ." 670 P.2d at 142.

[7] Similarly, the Court has stressed that it is necessary to focus on the particular act or decision that is challenged when deciding whether to grant absolute immunity for particularly sensitive functions. In *Harlow*, the Court held that, to obtain absolute immunity for a "special function," an official "must first show that the responsibilities of the office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted." 457 U.S. at 813 (emphasis

ing damages for the constitutionally impermissible pretermination procedures followed by the appellants, not for their actual decision to terminate his employment. Because departmental personnel rules specified the precise procedures to be followed by the appellants, they had no discretion whatsoever in that matter. Accordingly, the appellants were not entitled to immunity from the damages action brought by Mr. Scherer.

B. An Official Who Violates Well Defined Statutory Provisions Does Not Act With "Objective Legal Reasonableness" And, Accordingly, Is Not Entitled To Qualified Immunity.

In *Harlow*, this Court adopted a test for qualified immunity that "focuses on the objective legal reasonableness of an official's acts." 457 U.S. at 819. As the Court explained, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.*

While the legal reasonableness of an official's conduct has generally been determined by reference to clearly established rules of constitutional law, where, as here, officials have violated clearly established statutes or regulations, directly applicable to them, their conduct cannot be deemed to be objectively reasonable. Consequently, there is no reason to insulate such conduct from a damages action under Section 1983.[8]

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added). *See also Butz v. Economou*, 438 U.S. at 513-17 (federal executive officials have absolute immunity from damages when performing adjudicative or prosecutorial functions, but only qualified immunity when performing other executive functions); *Imbler v. Pachtman*, 424 U.S. at 430-31 (leaving open question whether prosecutors are entitled to absolute immunity when they administer their offices and investigate crimes instead of initiating and conducting prosecutions).

[8] Removal of an official's immunity upon the violation of statutory or regulatory law is not tantamount, as the United States suggests

1. Under *Harlow* and the policies established in this Court's cases, an official who violates statutory or regulatory law that governs his conduct is not acting with "objective reasonableness," 457 U.S. at 818, and is not entitled to immunity. Immunity reflects a balance between the enforcement of the Constitution and laws through a damages remedy, on the one hand, and the protection of governmental efficiency and officials who act in good faith, on the other. *See Harlow v. Fitzgerald*, 457 U.S. at 814; *Owen v. City of Independence*, 445 U.S. 622, 650-53 (1980); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). When an official acts in derogation of rules having the force of law, he does not exhibit the good faith that immunity strives in part to protect.[9] Absent good faith, it is not unfair to expose an official who has violated the Constitution to a damages action.

In the instant case, appellants breached legally binding regulations.[10] Florida Highway Patrol personnel regulations imposed on appellants a legal duty, before terminating an employee for violation of departmental rules, to investigate completely the alleged misconduct, to prepare a written report, including the employee's statement, and to provide the employee with written reasons before ter-

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in its brief as *amicus curiae* (Brief of United States at 26 n.27), to providing a damages remedy for violations of state law under the guise of an action under Section 1983. Section 1983 provides no relief for purely state law violations. To recover damages, the plaintiff must prove a violation of the "constitution or laws" of the United States. Only if the conduct that violated state law is also found to violate the Constitution will the official be liable for damages.

[9] *See King v. Higgins*, 702 F.2d 18, 21 (1st Cir. 1983); *Williams v. Treen*, 671 F.2d 892 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983).

[10] The district court held that General Order No. 43 of the Florida Highway Patrol, the regulation violated by appellants, "was promulgated pursuant to Section 120.53(1)(a) of the Florida Statutes, *see* Chapter 15B-11.14, Florida Administrative Code, and has the effect of statutory law." (J.S. 69a)

minating the employee (J.S. 69a). In hastily firing Mr. Scherer with neither notice nor an opportunity to be heard by the relevant decisionmaker, appellants engaged in conduct that violated these regulations. The same conduct that violated these regulations (and was, therefore, objectively unreasonable) also violated the Constitution. Whether or not the constitutional right at issue was clearly established at the time, appellants' conduct was not legally reasonable. That is precisely what the district court held. As this Court put it in an analogous context, "it is not unfair to hold [appellants] liable" for violating the Constitution since they knew or should have known at the time that they were "acting outside the law," *Butz v. Economou*, 438 U.S. at 506.

2. Denying an immunity defense to an official who violates a statute or regulation and, by the same conduct, also violates constitutional requirements that were not well defined at the time will not require public officials "to predict the future course of constitutional law," *Procunier v. Navarette*, 434 U.S. at 562. By keying the immunity defense to clearly established law of which a reasonable official should be aware, whether statutory or constitutional, federal or state, public officials will have notice of the conduct necessary to avoid liability. A public official who abides by the rules governing the exercise of his authority need not fear liability for violations of previously undeclared constitutional rights. Only an official who steps outside the law applicable to his actions is exposed to damages, and the official who violates the Constitution in so doing should bear the consequences of his conduct. An official whose conduct violates law of which he reasonably should have known cannot complain if the same conduct is later made the basis of a constitutional cause of action. *See Harlow v. Fitzgerald*, 457 U.S. at 819.

C. The Denial of Qualified Immunity Upon The Violation Of Clearly Established Statutory Provisions Will Not Lead To Insubstantial Lawsuits Proceeding To Trial, Deter The Vigorous Exercise Of Official Discretion, Or Discourage States From Enacting Prophylactic Measures.

Harlow establishes that the qualified immunity defense should raise legal questions that can be resolved by a court without the need for extensive discovery or trial. 457 U.S. at 816-17. Consideration of statutory and regulatory provisions in ruling on the immunity defense is fully consistent with *Harlow*.

In ruling on the availability of immunity, a court must make two determinations. The first inquiry, which is already required under *Harlow*, is whether the challenged conduct was discretionary. 457 U.S. at 818. A relevant consideration in this inquiry is whether statutes or regulations removed all discretion from the official with respect to the challenged act or decision. Because this issue involves only a determination of the legal effects of statutes and regulations, it can be accomplished in summary judgment proceedings.

The second inquiry, reached only if the challenged conduct was discretionary, is whether the official's actions were objectively reasonable. Under *Harlow*, the reasonableness of an official's conduct is determined by reference to clearly established constitutional and statutory law. 457 U.S. at 819. If the official's conduct violates a clearly established constitutional right, it is not objectively reasonable. Similarly, if the same conduct that is alleged to have violated the Constitution also breached a clearly established statute or regulation, then the official's conduct is not objectively reasonable, and immunity should be unavailable. Both questions raise purely legal issues that can be resolved upon a motion for summary judgment.[11]

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[11] Even as to clearly established rights, *Harlow* did recognize that limited rebuttal should be available to an official who "claims

The use of applicable statutes and regulations to judge the legal reasonableness of an official's conduct will not resurrect the inquiry into subjective good faith abandoned in *Harlow*. In measuring legal reasonableness by reference to statutes and regulations, a court need only determine whether the requirements of the statute or regulation allegedly breached were clearly defined at the time and whether the same conduct that allegedly violated the statute or regulation would also constitute a violation of the Constitution. These issues require a court to decide only the state of the law. The official's subjective motivation is no more relevant to these issues than it is to the question whether the alleged conduct has violated clearly established constitutional rights.

The approach proposed here would not unduly deter the exercise of official discretion by making the violation of every statute or regulation a ground for abrogating qualified immunity, as the United States suggests. (Brief of United States at 24-27.) The United States raises the spectre of officials being forced to defend themselves in unforeseeable constitutional damages suits simply for having violated a state regulation that requires the official to fill out forms in triplicate. (Brief of United States at 19.) Under the immunity test proposed here, this problem would not arise. The conduct in violation of a statute or regulation invoked to defeat immunity must be the same conduct also alleged to violate the Constitution; the Constitution does not require notices in triplicate. By focusing on the conduct now understood to be unconstitutional, and by measuring that conduct against the state law binding on the official at the time, a court would not deny an official immunity for insubstantial or

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extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard . . . . But again, the defense would turn primarily on objective factors." 457 U.S. at 819.

trivial transgressions.[12] Conduct amounting to minor violations of law, but not giving rise to a constitutional cause of action, would be irrelevant to the inquiry.

Finally, the United States relies on a debater's point in contending that, if its position does not prevail, state legislatures and other regulatory bodies will be reluctant to enact prophylactic measures governing official conduct for fear that, were they to do so, public officials would lose the immunity to which they would otherwise be entitled if they violated such a measure. (Brief of United States at 28.) This cynical view of the legislative process should be rejected. In the real world, state legislatures and other regulatory bodies enact regulatory measures to protect the state's citizens; they expect state officials to obey these laws and regulations. It is implausible that a lawmaker or regulator who favors the enactment of a particular law or regulation would be reluctant to adopt it merely because an official who later disobeys the law or regulation (and by the same conduct also violates the Constitution) might be subject to a damages action. The short answer from the lawmaker or regulator to the public official worried about damages liability is: obey the state's laws and regulations—and the clearly established requirements of the Constitution—and you will never have to worry about liability under Section 1983.

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[12] Moreover, there is no reason to believe that, if the decisions of the courts below are affirmed, qualified people will be discouraged from pursuing public service. Officials would not be subjected to arduous trials in unsubstantiated damages actions, because most cases would be resolved on motions for summary judgment. Nor would officials be unduly hampered in the performance of their tasks, since they must in any event comply with applicable statutes and regulations. Only people who are unable to conform their behavior to applicable regulations might be deterred from pursuing a public service career; and this is no loss to the public.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below insofar as it holds that the appellants are not entitled to qualified immunity.

Respectfully submitted,

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